DC 37, Local 768, 5 OCB2d 17 (BCB 2011)

(Arb.) (Docket Nos. BCB-2854-10 and BCB-2869-10)
(A-13384-10 and A-13478-10).

Summary of Decision: The City and NYCHA challenged the Union's requests to arbitrate NYCHA's decision to lay off employees working in community centers, and the City's concurrent decision to fund the community centers to provide similar services via private contractors. The City argued that it was not a proper party to the proceeding because the employees at issue were employees of NYCHA, not the City. The City and NYCHA both argued that the Union did not execute a valid waiver and that the Union did not alleged a source of right under which it may arbitrate its complaints. The Union argued that the City is a necessary party and that the New York Supreme Court ordered the parties to arbitrate these claims. The Board found that there was no nexus between the Union's grievance concerning statutory and constitutional claims and any agreement. Accordingly, the petitions challenging arbitrability were granted, and the requests for arbitration were denied. ***(Official decision follows.***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Arbitration

-between-

THE CITY OF NEW YORK and
THE NEW YORK CITY DEPARTMENT
OF YOUTH AND COMMUNITY DEVELOPMENT,

Petitioners,

- and -

THE NEW YORK CITY HOUSING AUTHORITY,

Petitioner,

- and -

DISTRICT COUNCIL 37, LOCAL 768, and
SOCIAL SERVICE EMPLOYEES UNION, LOCAL 371,

Respondents.

DECISION AND ORDER

On March 9, 2010, District Council 37 ("DC 37" or "Union"), on behalf of Local 768 and the Social Service Employees Union, Local 371, filed a request for arbitration as to the City of

New York ("City"), alleging that the City and its Department of Youth and Community Development ("DYCD"), and the New York City Housing Authority ("NYCHA") violated Article V, § 6 of the New York State Constitution and Local Law 35, New York City Charter § 312 ("Local Law 35"). On May 14, 2010, the Union filed a similar request for arbitration as to NYCHA. The alleged violations occurred when NYCHA laid off bargaining unit members at NYCHA-run community centers, and, thereafter, the City and DYCD entered into contracts with community-based organizations to provide services at the NYCHA community centers. On April 23, 2010, the City submitted a petition challenging arbitrability. On June 18, 2010, NYCHA likewise filed a petition challenging arbitrability.

The City argues that neither it nor DYCD is a proper party to this proceeding because the employees at issue were employees of NYCHA, not the City. The City and NYCHA both argue that the Union has not executed a valid waiver and that the Union has not alleged a source of right under which it may arbitrate its complaints. The Union argues that the City and DYCD are necessary parties because the City exercised control over the decision to contract out the services at the community centers, and any relief granted in the arbitration would affect the City. The Union acknowledges that, under Board precedent, the constitutional and statutory claims would not be arbitrable, but argues that in an order dismissing a plenary action asserting these claims, the Supreme Court of the State of New York, as affirmed by the Appellate Division, First Department, ordered the parties to arbitrate these claims, and, therefore, they must now be submitted to arbitration. Given the overlapping facts and issues presented here, this Board previously determined that the two petitions challenging arbitrability should be consolidated, and we thus decide all issues raised in both proceedings. The Board finds that there is no nexus

between the Union's grievance concerning statutory and constitutional claims and any agreement. Accordingly, the petitions challenging arbitrability are granted, and the requests for arbitration are denied.

BACKGROUND

This Board previously considered and determined a related matter, *DC 37, L. 768*, 3 OCB2d 7 (BCB 2010), *affd*., *Matter of Roberts v. N.Y. City Office of Collective Bargaining*, 33 Misc.3d 1224(A), 2011 N.Y. Slip Op. 52094(U) (Sup. Ct. N.Y. Co. Nov. 14, 2011) (Schlesinger, J.). In that case, the Union had filed a request for arbitration, dated January 29, 2009, in response to NYCHA's January 2009 decision to lay off its employees working in NYCHA community centers, and the City's decision to thereafter fund private contractors to provide similar services at these community centers. The Union based its arbitration request on § 11 of the Municipal Coalition Memorandum of Economic Agreement ("MCMEA"), to which the Union and the City are parties; NYCHA is not a party to the MCMEA. Section 11 of the MCMEA regulates the City's use of "Privatization/Contracting-Out/Contracting-In." *DC 37, L. 768*, 3 OCB2d 7, at 3. The Union and NYCHA were, however, signatories to a Memorandum of Agreement ("MOA"), which incorporated the relevant section of the MCMEA.

Contemporaneously, on February 10, 2009, the Union filed an action in the New York State Supreme Court, New York County, against various parties, including the Mayor of the City and the Chairman of NYCHA, alleging violations of Local Law 35 and Article V, § 6, of the

New York State Constitution.[1] The City moved to dismiss that action on the ground that the Union's waiver filed with the Office of Collective Bargaining ("OCB") pursuant to New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") § 12-312(d) precluded the Union from submitting to a judicial forum statutory and constitutional claims arising from the same facts.[2] In addition, the City and NYCHA both filed separate petitions challenging arbitrability of the January 2009 request for arbitration.

Before the Board reached a decision on the petitions challenging arbitrability filed by the City and NYCHA, on December 22, 2009, the Supreme Court, New York County, in *Matter of Roberts v. Bloomberg,* 26 Misc.3d 1006 (Sup. Ct. N.Y. Co. 2009) (Tolub, J.), *affd*., 83 A.D.3d 457 (1st Dept.), *lv. denied*, 17 N.Y.3d 706 (2011), granted the City's motion to dismiss on the ground that the waiver the Union executed in the arbitration matter precluded submitting statutory and constitutional claims to the Court. The Court stated, in pertinent part:

> Petitioners in this application claim that they are not precluded from commencing the instant special proceeding because it seeks a remedy for a statutory violation and does not advance a contractual claim. Respondents contend that the language of the statute which mandates the waiver of the right to have the underlying dispute heard by another forum was designed to have the arbitration

[1] Local Law 35 of 1994 (New York City Charter § 312(a)) sets out requirements that an agency must follow before entering into or renewing certain contracts for services. Article V, § 6, of the New York State Constitution governs appointments and promotions in civil service.

[2] NYCCBL § 12-312(d) states in pertinent part:

> As a condition to the right of a municipal employee organization to invoke impartial arbitration under such provisions, the grievant or grievants and such organization shall be required to file with the director a written waiver of the right, if any, of said grievant or grievants and said organization to submit the underlying dispute to any other administrative or judicial tribunal except for the purpose of enforcing the arbitrator's award.

> process resolve the entire matter placed in dispute, and not just a fragment of the issues. As such, respondents argue that petitioners' attempt to carve out an exception for addressing statutory or constitutional claims in a separate forum should be rejected. . . .
>
> A plain reading of the waiver provision contained in [NYCCBL § 12-312(d)] does not lend itself to petitioners' theory of exemption. The statute dictates that in order to invoke the right to arbitrate, the parties must waive their right to submit "the underlying dispute" to any other administrative or judicial tribunal except when enforcing an arbitration award. There is nothing in the language of the statute to support the petitioners' position that claims of statutory or constitutional violation are to be resolved in a different forum. . . .
>
> The clear wording of the statute called into question, and the existence of only one carefully carved out exclusion supports respondents' position that the only possible interpretation of the statute is that in order to invoke arbitration of an issue, the entire issue must be submitted and a waiver must be executed before arbitration may proceed (*see, City of New York v. MacDonald*, 239 A.D.2d 274, 657 N.Y.S.2d 681 [1st Dept. 1997]). Petitioners submitted a request to arbitrate this matter in February of 2009. They must now arbitrate the matter in dispute in that forum.

Id. at 602-03.

Thereafter, on January 28, 2010, the Union appealed this decision to the Appellate Division of the Supreme Court, First Department.

On March 9, 2010, the Union filed a request for arbitration as to the City in which it alleged violations of the same laws that were the basis for its lawsuit, Local Law 35 and Article V, § 6, of the New York State Constitution. The Union filed a similar request for arbitration as to NYCHA on May 14, 2010. The grievances are articulated as follows:

> Whether [NYCHA], [DYCD], and [the City] violated Article V, § 6 of the [New York State] Constitution and [Local Law 35], regarding the letting of contracts to community-based organizations to provide community services presently performed by DC 37 represented employees, in that

> 1) NYCHA layoff plan was conceived in bad faith and is subterfuge to avoid the protection afforded to civil service employees in violation of Art. V, § 6 of the [New York State] Constitution;
>
> 2) NYCHA DYCD and the City violated [Local Law 35] by failing to follow the procedures and requirements set forth herein, including, but not limited to:
>
> a) Failing to submit a detailed analysis and supporting documents to the Comptroller;
> b) Failing to perform a comparative analysis; and
> c) Failing to prepare and implement a plan of assistance for dispute.

(City's Pet., Ex. 1).

As a remedy at arbitration, the Union seeks rescission of any contracts with contractors providing community services and seeks compliance with § 12 of Local Law 35, and any other remedy to make bargaining unit members whole, including reinstatement with back pay.

On April 7, 2011, the Appellate Division, First Department, affirmed the Supreme Court's decision in *Matter of Roberts v. Bloomberg*. In pertinent part, the Appellate Division stated:

> [The] Supreme Court properly determined that this proceeding is barred by the waiver petitioners filed. When construing [NYCCBL] § 12–312(d) in accordance with its plain meaning, as one must, where, as here, the statute is unambiguous (*see Patrolmen's Benevolent Assn. of City of N.Y. v. City of New York*, 41 N.Y.2d 205, 208 (1976)), it is clear that petitioners agreed to arbitrate the entire dispute, not just contractual claims. Indeed, there is nothing in the statute or its legislative history to support petitioners' position that statutory or constitutional claims are exempt from the waiver.

Matter of Roberts v. Bloomberg, 83 A.D.3d at 458 (parallel citations omitted).

Concurrent with the pendency of this state court action, and shortly after the Supreme Court's decision in *Matter of Roberts v. Bloomberg*, the Board rendered its decision in *DC 37, L. 768*, 3 OCB2d 7. In the decision, the Board found that the contract claim related solely to NYCHA, as the employer of the affected employees and dismissed the request for arbitration as to the City. As to NYCHA, the Board found that the Union did not establish a nexus between the incorporated provisions of the MCMEA and NYCHA's contested actions. Accordingly, the Board granted NYCHA's challenge to arbitrability. Further, the Board addressed the Supreme Court's decision in *Matter of Roberts v. Bloomberg*:

> Though not referenced in the court opinion, the court disregarded this Board's decision in *UFA*, 73 OCB 3A (BCB 2004) (which the parties' submissions before the Court make clear was brought to the court's attention in the Union's memorandum of law). In *UFA*, after conducting an extensive review of recent federal and state court decisions regarding arbitration and the question of waiver of statutory rights, this Board held that consistent with the current state of the judicial case law, "the scope of the OCB waiver is limited to contractual claims under the collective bargaining agreement. In other words, the 'underlying dispute' referred to in the OCB waiver does not encompass all statutory, constitutional, or common law claims arising from the same factual circumstances." 73 OCB 3A, at 13. Our decision further held that, to the extent the Board's prior decisions were inconsistent, they were overruled.
>
> At the time of the submissions in the present matters, the Union could not have anticipated that the court in *Matter of Roberts* would rule, inconsistent with our well-settled case law, as well as with the court decisions relied upon in our 2004 *UFA* decision, that statutory and constitutional claims must be submitted to arbitration before the OCB panel of labor arbitrators.[3] Therefore, we are

[3] We also stated in our decision that:

> "Statutory and constitutional claims" would include claims under Title VII, the ADA, the FLSA, and other anti-discrimination and regulatory statutes, as well as the violations of the City Charter and the State Constitution claimed by the Union herein. While it

> constrained by the court's decision to entertain consideration of whether the statutory and constitutional claims ruled by the court to be within the scope of the Union's waiver are, therefore, subject to arbitration under the NYCCBL.
>
> Accordingly, while for the reasons stated above we find that DC 37's contractual grievances are not arbitrable, we do not opine on the arbitrability of the statutory and constitutional claims which the court in *Matter of Roberts v. City* evidently assumed were arbitrable. Should the Union submit a request to arbitrate the related statutory or constitutional claims, we will address at that time any question raised concerning whether the request is timely, given the unique circumstances of this case, and whether the claims are arbitrable.

DC 37, L. 768, 3 OCB2d 7, at 17-18. Thereafter, the Union timely appealed this decision of the Board to the Supreme Court of the State of New York, New York County.

On November 14, 2011, the Supreme Court upheld the Board's decision in *DC 37, L. 7*68, 3 OCB2d 7 (BCB 2010). In its decision finding that the Board's decision was neither arbitrary nor capricious, the Court explained that:

> [T]he [Board's] determination was limited to the record before it, as the Board indicated when it stated: "NYCHA's decision to allow the City to operate community centers on NYCHA property does not permit, let alone, require, a finding that NYCHA is the operator of the centers. *Absent anything more*, we are unable to find any issue arising under the applicable agreement between NYCHA and the Union." Also emphasizing the limits of its findings, the Board indicated in its decision, and confirmed at oral argument, that the decision in *Roberts v. Bloomberg* suggested that the Union might well bring another claim before the Board

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> appears a logical consequence of its decision, it seems questionable that the court in *Matter of Roberts* could have intended such a broad sweep for the NYCCBL waiver requirement, inasmuch as this would be contrary to established precedent from the state and federal courts.

DC 37, L. 768, 3 OCB2d 7, at 18, fn. 8.

> alleging statutory and constitutional violations, and the Board was taking no position on those issues.

Matter of Roberts v. Bloomberg, 33 Misc.3d 1224(A) at *6 (emphasis by the Court).

POSITIONS OF THE PARTIES[4]

City's Position

The City argues that neither the City nor DYCD is a proper party to this proceeding because the employees at issue were employees of NYCHA, which is not a municipal agency. Similarly, in a prior decision the Board found that the City and DYCD were not proper parties to the Union's previous arbitration request and dismissed them as parties. Since this request for arbitration arises from the same facts as the previous request, the City and DYCD are likewise not proper parties to this action.

Further, in order to arbitrate a matter, the parties must waive the right to submit their dispute to another tribunal. By initially submitting the matter at issue here to a judicial tribunal, the Union has made itself unable to execute a valid waiver. Moreover, the Union submitted to arbitration this matter, which they have already litigated and upon which a judge has already rendered a decision.

Finally, the Union has not alleged any valid source of right enabling them to arbitrate their complaints. The Board has already held that the Union's claim regarding the layoff of NYCHA employees has no nexus to the MCMEA. Further, while the Union asserts that the City

[4] At the request of the parties, this matter was held in abeyance pending the resolution of *Matter of Roberts*. The positions of the parties reflect a letter brief from the Union and NYCHA's reply, both submitted after the Appellate Division's decision in *Matter of Roberts v. Bloomberg*, 83 A.D.3d 457 (2011). The City declined to submit a reply.

violated the New York State Constitution and Local Law 35, there is no basis for arbitrating such claims.

NYCHA's Position

NYCHA argues that the Union's request for arbitration should be dismissed because the Union has not alleged a violation of a NYCHA rule or regulation, or a collective bargaining agreement that would require arbitration. The affected employees were NYCHA employees, but NYCHA did not contract out their work. The City Council funded DYCD, not NYCHA, to keep the community centers open. Further, Local Law 35's obligation to perform comparative analysis or submit documentation to various entities including the Comptroller, the City Council, or collective bargaining agencies does not apply to NYCHA because it did not employ any contracted employees to staff the community centers.

There is no nexus between the New York State constitutional and statutory provisions cited by the Union and the applicable grievance definition in the parties' collective bargaining agreement. Even assuming that the statutory or constitutional violations could be arbitrated, the Union cannot show a nexus between the facts and those alleged sources of right. NYCHA decided to close 19 of its community centers. Separately, the City, through DYCD, funded non-profit organizations that provide programming to 25 NYCHA community centers. Although these 25 community centers include the 19 centers that NYCHA closed down, NYCHA did not contract with the private agencies. Even if it had contracted out services, Local Law 35 applies to the City agencies, not to NYCHA. Likewise, Article V, § 6, of the State Constitution does not apply to NYCHA as the New York State Court of Appeals has found that this section does not apply to public authorities.

NYCHA also argues that the Union is unable to execute a valid waiver in this proceeding because the same statutory and constitutional provisions as well as the underlying dispute are both alleged in the request for arbitration as well as the judicial proceeding. Even if the Union were able to execute a valid waiver, the Board is limited to interpreting the New York City Collective Bargaining Law, and therefore it is not for the Board to perform a legal analysis of either the New York City Charter or the New York State Constitution. NYCHA argues that such matters "are outside the jurisdiction of the [Board], and therefore outside of the scope of the Arbitrator." (NYCHA Rep., ¶ 40).

Finally, the outcome in *Matter of Roberts v. Bloomberg* precludes a separate action from being adjudicated at arbitration where the issue is "virtually identical" to the issues raised in *Matter of Roberts v. Bloomberg*, and are being raised "on behalf of the 'collective' and not on behalf of one individual who is asserting rights on their own behalf." (NYCHA Rep. ¶ 43). Indeed, the Union seeks to arbitrate the exact same claims that the Board found were not arbitrable in *DC 37, L. 768 and SSEU L. 371*, OCB2d 7 (BCB 2010). The Court's decision in *Matter of Roberts v. Bloomberg* does not bar NYCHA's challenge to arbitrability because the Court does not have authority to require arbitration of matters not contemplated in the collective bargaining agreement. *Matter of Roberts v. Bloomberg* does not create a duty to arbitrate matters outside the parties' collectively bargained definition of grievance, which the Court cannot modify or enlarge.

Union's Position

In response to the City's challenge, the Union argues that the City and DYCD are necessary parties to the arbitration because the City funded and oversaw the community centers.

The City exercised control over the decision to contract out the services at the community centers. Further, any relief granted in the arbitration would affect the City. The Union argues that the actions taken by NYCHA to layoff the Union's bargaining unit members, and the City's action of contracting to have this same work performed by private entities, had the effect of displacing civil servants. Thereby, together, NYCHA and the City circumvented § 312 of the City Charter and violated the New York State Constitution, Art. V, § 6, and its merit and fitness clause. As to NYCHA's argument that it is not a City agency as defined by the City Charter and that § 312 of the City Charter does not apply to it, these are substantive questions for an arbitrator.

The Union acknowledges that, under Board precedent, the New York State constitutional and statutory claims would not be arbitrable. The Union believes, however, the Court in *Matter of Roberts v. Bloomberg*, ordered the parties to arbitrate these claims. The parties are required to arbitrate these claims pursuant to *Matter of Roberts v. Bloomberg*, not pursuant to a collective bargaining agreement. The Union agrees that there is no nexus between its claims and any collective bargaining agreement. Instead, the Union's legal claims have a nexus with § 312 of the New York City Charter, and the New York State Constitution, Art. V, § 6. The City violated the City Charter's mandates regarding contracting services. The City's actions also violated the New York State Constitution by circumventing the civil service law.

The Union argues that, in light of *Matter of Roberts v. Bloomberg*, the petitions challenging arbitrability must be denied. A party cannot take different positions on the same matter in different forums. The Union characterizes the arguments advanced, successfully, by both NYCHA and the City in *Matter of Roberts v. Bloomberg*, as contending that the waiver requires that the parties arbitrate the Union's statutory and constitutional claims. Having so

argued, they both should be estopped from challenging arbitrability. Further, to the extent that the City and NYCHA argue that *Matter of Roberts v. Bloomberg* does not require the parties to arbitrate the Union's claims, but merely permits the Board to examine a challenge to arbitrability, such an argument must also fail. The judicial decisions require that the parties must now arbitrate this matter. A decision by the Board granting the petitions challenging arbitrability would contravene the *Matter of Roberts v. Bloomberg* decision.

DISCUSSION

Pursuant to NYCCBL § 12-302, it is the policy of the NYCCBL to favor the use of arbitration to resolve disputes or grievances.[2] *See, e.g.*, *SSEU, L. 371*, 4 OCB2d 38, at 7 (BCB 2011); *Local 621, SEIU*, 4 OCB2d 36, at 12 (BCB 2011); *DC 37, Local 1157*, 4 OCB2d 18, at 6 (BCB 2011). To carry out this policy, the Board is charged "with the task of making threshold determinations of substantive arbitrability." *DEA*, 57 OCB 4, at 9-10 (BCB 1996); *see* NYCCBL § 12-309(a)(3).[3] While "doubtful issues of arbitrability are resolved in favor of arbitration . . . the Board cannot create a duty to arbitrate where none exists, nor can we enlarge a

[2] NYCCBL § 12-302 provides:

> It is hereby declared to be the policy of the city to favor and encourage the right of municipal employees to organize and be represented, written collective bargaining agreements on matters within the scope of collective bargaining, the use of impartial and independent tribunals to assist in resolving impasses in contract negotiations, and final, impartial arbitration of grievances between municipal agencies and certified employee organizations.

[3] NYCCBL § 12-309(a)(3) grants the Board the power "to make a final determination as to whether a dispute is a proper subject for the grievance and arbitration procedure. . . ."

duty to arbitrate beyond the scope established by the parties." *Local 924, DC 37*, 1 OCB2d 3, at 8 (BCB 2008).

This Board has established the following two-pronged test to determine whether a matter is arbitrable:

> (1) Whether the parties are in any way obligated to arbitrate a controversy, absent court-enunciated public policy, statutory, or constitutional restrictions, and, if so (2) whether the obligation is broad enough in its scope to include the particular controversy presented. In other words, whether there is a nexus, that is, a reasonable relationship between the subject matter of the dispute and the general subject matter of the Agreement.

New York City Dist. Council of Carpenters, UBCJA, 3 OCB2d 9, at 11 (BCB 2010) (citations and internal quotation marks omitted).

Generally, when arbitrability questions come before us, a claim pursuant to a collective bargaining agreement is at issue. Here, however, as the Union conceded in its Answer, "there is no nexus between any collective bargaining agreements and the statutory and constitutional claims [presented here] except to the extent [that] the Union seeks to arbitrate A-12994-09 [the subject transactions] and the statutory and Constitutional claims aris[ing] out of the same facts." (Ans. ¶ 49). According to the Union, the parties are obligated to arbitrate these claims based upon the judicial decisions in *Matter of Roberts v. Bloomberg*.

In *DC 37, L. 768*, 3 OCB2d 7, we found that "the [Union] members who were employed at the community centers were solely employed by NYCHA; their collective bargaining agreement was with NYCHA only." *Id.* at 14. We further stated that the record established "a contractual relationship providing for arbitration of disputes with NYCHA only; the City is not

similarly bound." [4] *Id.* Our decision was explicitly upheld on those very grounds. *Matter of Roberts v. N.Y. City Office of Collective Bargaining*, 33 Misc.3d 1224(a), at **5-6. However, the record does not demonstrate that the parties have ever agreed to arbitrate statutory or constitutional claims such as those presented here. Therefore, we find that there is no nexus between the alleged sources of right and the grievance provisions in the collective bargaining agreement between NYCHA and the Union.

Moreover, although the Union and NYCHA have agreed to arbitrate certain disputes pursuant to their collective bargaining agreement, the Union does not contend that this dispute is covered by that agreement. Instead, the Union claims that the decision of the Supreme Court as affirmed by the First Department effectively ordered the parties to arbitrate these claims. This, however, is not an accurate reading of the Appellate Division's decision. In fact, the Appellate Division found that the "Supreme Court properly determined that this proceeding is barred by the waiver *petitioners* filed." *Matter of Roberts v. Bloomberg*, 83 A.D.3d at 458 (emphasis added). Indeed, the Appellate Division underscored that "it is clear that *petitioners* agreed to arbitrate the entire dispute, not just contractual claims," and that by this action, the Union relegated itself to the arbitral forum. *Id.* (emphasis added). From these decisions, the Union contends, without supporting authority, that its choice to sign the waiver is binding upon the City and NYCHA. No grounds have been provided why the Union's unilateral election to sign the waiver in A-12994-

[4] Although our dissenting colleague states that "[i]t is well known in other forums NYCHA has asserted that it is an agency of the City," the record evidence in the present matter does not support this contention.

09 should bind the City and NYCHA to arbitrate a dispute that neither party had ever agreed would be subject to arbitration.[5]

Although we find that this particular matter is not arbitrable because there is no showing that the City or NYCHA agreed to arbitrate these statutory or constitutional claims, this finding is specific to the facts presented here. We express no opinion regarding whether, in a case where a nexus existed between a collective bargaining agreement and the claims presented, such contractual claims would, in bringing "the entire dispute," permit arbitration of the constitutional or statutory claims.

The judicial rulings that the "underlying dispute" concerns all claims statutory and contractual, arising from the same factual circumstances, have deprived the individual employees, here represented by a Union, of any forum for asserting their statutory rights. *See UFA*, 73 OCB 3A (BCB 2004). We do not presume that the Courts intended this result. Nevertheless, in applying the decisions in *Matter of Roberts v. Bloomberg*, we cannot reach a different result here.

Accordingly, the petitions challenging arbitrability are granted and the requests for arbitration are denied.

[5] No additional facts relating to the course of dealings between the parties, or between NYCHA and the City, have been pleaded in this matter nor has any party sought to amend its pleadings to assert the theories raised before the court in *Matter of Roberts*, 33 Misc.3d 1224(A), but not raised before this Board, and as to which the Court, in reviewing that our determination in *DC 37, L. 768*, 3 OCB2d 2, declined to opine. *Matter of Roberts*, 33 Misc.3d 1224(A), at **5, 6. Therefore, as neither party raised these additional claims, we express no opinion, nor do we make any findings concerning what the outcome might be under such other circumstances.

ORDER

Pursuant to the powers vested in the Board of Collective Bargaining by the New York City Collective Bargaining Law, it is hereby

ORDERED, that the petition challenging arbitrability filed by the City of New York and the New York City Department of Youth and Community Development, docketed as BCB-2854-10, hereby is granted; and it is further

ORDERED, that the petition challenging arbitrability filed by the New York City Housing Authority, docketed as BCB-2869-10, hereby is granted; and it is further

ORDERED, that the requests for arbitration filed by District Council 37, Local 768 and SSEU Local 371, docketed as A-13384-10 and A-13478-10, hereby are denied.

Dated: April 18, 2012
New York, New York

MARLENE A.GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA S. SILVERLATT
MEMBER

I dissent in a separate opinion attached hereto.

PETER B. PEPPER
MEMBER

The City of New York and DYCD, Petitioners, and NYCHA, Petitioner v. DC-37, Local 768 and Social Service Employees Union, Local 371, Docket Nos. BCB 2854-10 and 2869-10

I dissent. The majority contends that there is no showing that DYCD or NYCHA agreed to arbitrate the statutory or constitutional claims presented in these cases. In addition, the majority clearly states that it does not presume that the Courts' decisions in Matter of Roberts v. Bloomberg did not intend this result. However, unfortunately this is what we now have. These were employees of NYCHA whose work was contracted out by the City and DYCD. To assert that NYCHA has no connection to these issues is also very troublesome. It is well known that in other forums NYCHA has asserted that it is an agency of the City. In this matter, the City, through DYCD, funded and oversaw the community centers including the same nineteen that NYCHA closed down. It is very difficult to understand this alleged lack of connection. The end result is particularly perturbing as it leaves the union represented employees with no forum for asserting their statutory rights as concerns their now contracted out positions.